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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 FRONTIER AIRLINES, INC.,

4 Plaintiff,

New York, N.Y.

5 v.

22 Civ. 2943 (PAE)

6 AMCK AVIATION HOLDINGS IRELAND
7 LTD., *et al.*,

8 Defendants.
-----x

9
10 August 10, 2023
11:30 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 U.S. District Judge
14

15 APPEARANCES
16

17 LANE POWELL PC
Attorneys for Plaintiff

18 BY: DAVID SCHOEGGL

-AND-

19 BINDER & SCHWARTZ, LLP

20 BY: ERIC FISHER

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23 BY: JEFF BUTLER

-AND-

24 MILBANK LLP

BY: JED SCHWARTZ

SAMANTHA LOVIN

25 EMILY WERKMANN

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(Case called)

THE DEPUTY CLERK: Counsel, starting at the front table, please state your appearance for the record.

MR. FISHER: Good morning, your Honor. Eric Fisher from Binder & Schwartz for Frontier Airlines.

THE COURT: Good morning, Mr. Fisher.

MR. PRUDEN: Good morning, your Honor. Gregoy Pruden from Binder & Schwartz for Frontier Airlines.

THE COURT: Good morning, Mr. Pruden. You may be seated.

For the Defense?

MR. BUTLER: Good morning, your Honor. Jeff Butler from Clifford Chance for the defendants.

THE COURT: Good morning.

MS.. WERKMANN: Emily Werkmann from Milbank on behalf of the defendants.

THE COURT: Good morning.

MS. LOVIN: Good morning, your Honor. Samantha Lovin from Milbank on behalf of defendants.

THE COURT: Good morning.

MR. SCHWARTZ: Good morning, your Honor. Jed Schwartz also from Milbank on behalf of defendants.

THE COURT: I understand from my law clerk that there was a number of people from each side who may be auditing by phone. Let me ask counsel who are present, rather than opening

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1 the phone line, if you know who from your respective clients is
2 auditing.

3 Mr. Fisher?

4 MR. FISHER: Your Honor, I know that our co-counsel
5 from Lane Powell, David Schoeggl is participating by telephone.
6 I'm not sure whether or not we have a client representative on
7 the line as well.

8 THE COURT: Very good.

9 And for the defense?

10 MR. SCHWARTZ: Yes, your Honor; two client
11 representatives, Mr. Bill Hoffman and Mr. Cliff Dameron.

12 THE COURT: Very good. Welcome to all of the
13 telephonic participants. You may all be seated. I have a
14 brief not a ruling but scene-setting statement which hopefully
15 will help frame where we are at.

16 Good morning, counsel. The Court scheduled this
17 hearing as status conference with respect to the preliminary
18 injunction that has been in place in this case since July 18.
19 The purpose of the injunction, as counsel will recall, was to
20 protect Frontier against irreparable harm it has shown itself
21 to face based on the default notices that defendants had issued
22 with respect to 14 aircraft on which Frontier relies.

23 Since then, the Court has received submissions from
24 counsel with respect to two issues. Each issue, depending on
25 how it is resolved, has the capacity to cause the Court to

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1 dissolve the preliminary injunction.

2 The first involves a proposed guaranty by the
3 defendants. As proposed, defendants would guarantee Frontier's
4 recovery of any monetary damages that Frontier may receive in
5 the pending litigation before Judge Stanton in which Frontier
6 alleges a violation by defendants of the parties' so-called
7 framework agreement. A satisfactory guarantee would eliminate
8 the stated basis on which Frontier has declined to execute
9 certain transaction documents relating to the assignment of
10 ownership of planes used by Frontier. Frontier's refusal to
11 execute these documents, which defendants viewed as
12 unreasonable, was the basis on which of the defendants issued
13 default notices. As proposed, upon the execution of the
14 guaranty, Frontier would sign the transaction documents and
15 defendants, in turn, would retract the default notices. By
16 definition, defendants' withdrawal of the default notices would
17 eliminate the threatened harm. And so, the issue before the
18 Court is whether the guarantee, as proposed by defendants, is
19 satisfactory so as to make the harm that Frontier faces
20 reparable at Frontier's hand rather than irreparable.

21 The Court has closely reviewed defendants' proposed
22 guaranty and Frontier has expressed concerns about it in the
23 filings at Docket 116; and most recently defendant's response
24 to Frontier filed late yesterday in the form of a declaration
25 by Javier Meireles at Docket 119. I commend counsel for

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1 working productively towards a satisfactory guaranty. My
2 judgment is that the guaranty terms that defendants have put
3 forward are very, very close to clearing the bar. By that I
4 mean that the offer of the guaranty, as formulated by
5 defendants, is very close to giving plaintiffs relief that
6 would eliminate their claim of irreparable harm. I do have
7 questions for counsel about some aspects of defendants'
8 proposed guaranty and I will return to that subject in a few
9 moments.

10 The second issue involves defendants' motion, in
11 substance, for reconsideration of the preliminary injunction.
12 The motion is styled as one to "alter or amend" the Court's
13 July 18 order putting in place the preliminary injunction.
14 But, as becomes clear on reading that motion, defendants are
15 arguing that the preliminary injunction never should have
16 issued and now should be withdrawn, because, defendants
17 contend, plaintiff did not show a likelihood of success on the
18 merits or even a fair question going to the merits. Therefore,
19 as I indicated in my order of August 3, at Docket 113, I am
20 treating this as a motion for reconsideration. As I indicated
21 there, defendants' argument is colorable. It raises
22 substantial questions. It presents defendants' legal
23 objections to a preliminary injunction far more clearly than
24 had defendants' earlier written submissions.

25 In the August 3 order I gave Frontier until next

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1 Wednesday, August 16, to respond; and defendants until the
2 following Wednesday, August 23, to reply. In the event that
3 the preliminary injunction has not, by then, been dissolved by
4 virtue of the execution of a guaranty, the Court would then
5 resolve the motion for reconsideration. In the event the Court
6 were to find with defendants, that would result in dissolution
7 of the preliminary injunction.

8 So that's a framework, if you will. For today,
9 though, the issue before us is just the proposed guaranty and I
10 want to begin by raising some questions with counsel.

11 So, to summarize, plaintiff's stated objections to
12 defendants' proposed guaranty, there really were three. One is
13 that Maverick is not outside of defendants' control; number two
14 is that defendants' net worth certification raises some
15 questions; and number three, is essentially that plaintiff's
16 enforcement mechanism is to go to court. What if -- plaintiff
17 says -- Maverick doesn't honor the guaranty? Let me take care
18 of a couple of items first.

19 To begin with, plaintiff, I am completely unpersuaded
20 by the idea that you have to go to court to enforce a legal
21 right. Courts are not bad places and, essentially, if you have
22 the functional equivalent of a promissory note or guaranty,
23 this is not going to be the Battle of Verdun as you go to
24 enforce it. The fact that you have to go to Court to enforce
25 your legal rights is a lame objection that I reject.

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1 Second, with respect to the net worth certification,
2 although I am happy to hear from plaintiffs, I will tell you
3 that I found Mr. Meireles' declaration quite satisfactory in
4 answering those questions. I don't think there is a
5 substantial argument that could be pursued based on what I am
6 seeing as to the adequacy of the net worth certification. The
7 real issue here, to my mind, is that there isn't satisfactory
8 mechanism that I can see to guard against the scenario under
9 which, even though there is sufficient net worth now, Maverick
10 might move assets out or put itself in a position where, in the
11 future, it was either judgment-proof or partly judgment-proof.
12 I think this ought to be an easily solvable situation, I think
13 it probably involves some mechanism for advance notice before
14 some action would be taken that would compromise Maverick's net
15 worth. But, Mr. Schwartz, if you are the right person to take
16 that up with, that seems to me the one outstanding issue. The
17 fact that Maverick is not outside defendants' control doesn't
18 seem to be a big deal here. The issue is just making sure that
19 whether it is Maverick or defendants that no action is taken
20 that diminishes the net worth of Maverick to a point where
21 Maverick couldn't be tapped as a guarantor.

22 Mr. Schwartz, your thoughts on that?

23 MR. SCHWARTZ: Thank you, your Honor.

24 I will put aside the issue about outside of control
25 because I think that was based on a misinterpretation of some

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1 of the Court's statements about what needed to be outside of
2 control.

3 THE COURT: And my statements probably could have been
4 more fine tuned.

5 MR. SCHWARTZ: Your Honor, I would like to explain
6 what Maverick is because I think that would probably go -- I
7 think -- all the way to satisfying any concern.

8 Frontier has called Maverick a special purpose entity.
9 It is not that. In the most recent submission, they point to
10 three special purpose entities owned by a fund that is not
11 Maverick that entered into a transaction that had pre-existing,
12 non-recourse loans, that the lender on those loans then put
13 those entities into bankruptcy and they're trying to equate
14 those three special purpose entities with Maverick, the
15 guarantor here. They're night and day.

16 So, Maverick is the center of mass here.

17 THE COURT: Is the?

18 MR. SCHWARTZ: Center of mass. Let me just give you
19 the facts.

20 Maverick owns, indirectly, 120 different aircraft that
21 it leases to 33 different airlines. Maverick has, on order,
22 with aircraft manufacturers, over a billion dollars' worth of
23 aircraft to be delivered to Maverick or its subsidiaries within
24 the next few years. This is not an entity that can just pack
25 up overnight and disappear on a whim, and certainly is not

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1 going to do something like that to avoid the possible
2 obligation of a potential claim if Frontier wins before Judge
3 Stanton and if AMCK doesn't pay any judgment that is owed. It
4 is a real entity that has real business relationships and the
5 idea that it would -- I apologize, I'm going a little fast, I
6 will slow down -- the idea that it would risk relationships
7 with literally dozens of airlines, aircraft manufacturers, and
8 denude itself of nearly \$2 billion of assets to avoid the, at
9 best, \$44 million judgment that Frontier is seeking, it is just
10 not based in reality.

11 I think it is really important for the Court to
12 understand why we think it is such a strong guaranty because
13 this is a credit-worthy guarantor -- and my clients are on the
14 line so I also, your Honor, I would be remiss if I don't say
15 this -- this is not something easily given by my clients, there
16 is no obligation under the lease. Frontier doesn't even claim
17 that there is an obligation to provide a guarantee, this is a
18 purely commercial decision that my clients are making to try to
19 move past this dispute, to try to stop further injury to my
20 clients. They've already lost four aircraft sales. My
21 understanding is if we get this resolved promptly there is a
22 possibility that we could get two of the four back. Certainly
23 not a guarantee by any means, but that's the scenario we find
24 ourselves in. And, to get that done, we have gone to what --
25 when I said the center of mass.

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1 THE COURT: I'm not getting the word.

2 MR. SCHWARTZ: Mass, M-A-S-S, operations, whatever you
3 want to call it, the entity that is at the center of this --

4 THE COURT: The various transactions that are causing
5 the agita from the front table, you say, essentially center on
6 Maverick.

7 MR. SCHWARTZ: No. No, actually it is not. Maverick
8 is separate. What I am saying is the operations of Carlyle as
9 an aircraft leasing entity are centered, to a large part, on
10 Maverick. That's why I think it is so important. We are
11 giving you the entity that has the aircraft, has the \$2 billion
12 of assets, that has the relationships with almost three dozen
13 airlines. That's the entity that is giving the guaranty. So I
14 really don't think the concern that -- especially in light of
15 the fact that we are giving a certification quarterly as to the
16 net worth and giving financial statements, that we are going to
17 get rid of all of the assets and everything that would be
18 required to do that with all of the relationships that I just
19 mentioned with the different airlines, is a realistic
20 possibility.

21 THE COURT: OK. Let me ask you, so there is a
22 quarterly certification and a quarterly financial statement
23 that the plaintiffs would get?

24 MR. SCHWARTZ: Correct.

25 THE COURT: Maverick is privately held?

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1 MR. SCHWARTZ: It is an investment -- it is owned by
2 an investment fund, it is not a publicly-traded company if
3 that's the --

4 THE COURT: In other words, plaintiff's visibility is
5 limited to that which the guaranty provides it, there is not
6 some other way in.

7 MR. SCHWARTZ: There is no SEC filings that I'm aware
8 of or something like that. I think the only way they would get
9 visibility -- I am checking with my colleague, yes -- the only
10 way they would get visibility would be the information that we
11 are providing.

12 THE COURT: Thank you. That is quite helpful context.
13 Let me turn to you, Mr. Fisher, if you will be taking
14 the lead. That sounds pretty persuasive. There is an old
15 metaphor about gift horses and mouths here. Is there really a
16 reason to be skeptical of that?

17 MR. FISHER: Your Honor, let me go right to the
18 question on the table which is the creditworthiness of the
19 proposed guarantor. And just to quickly frame my discussion of
20 that issue, in principle, in light of the guidance that your
21 Honor provided at the July 18 conference, I think we understand
22 fully that where we would like this to go is to be offered an
23 acceptable guaranty, to have the default notices withdrawn,
24 that would make the need for injunctive relief moot and the
25 conjunction could be dissolved. That's where we are all trying

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1 to get to. We received the proposed guaranty on August 1, and
2 then it was submitted to the Court along with the motion for
3 reconsideration on August 2. When we, in order to find out who
4 is this guarantor that is being proposed, the only information
5 really that we have is this single piece of paper that is
6 attached as Exhibit 3 to our letter. And taking a look at that
7 piece of paper which has been the subject, of course, of the
8 dueling declarations of Mr. Wetzel and then Mr. Meireles.

9 It is not apparent at all that this entity is a center
10 of operations. All of its assets seem to consist of
11 investments from parent companies. rather than sitting at the
12 center of operations, it seems to sit at the center of a
13 network of other entities that also are entirely opaque to us.
14 And this balance sheet itself says that, in terms of the
15 description of assets, that's not prepared in compliance with
16 GAAP.

17 THE COURT: What is wrong with the explanation that
18 Mr. Meireles gave to that? I appreciated your raising the
19 question but what was wrong with the answer?

20 MR. FISHER: Your Honor, Mr. Meireles, as I understand
21 it, says that all \$1.7 billion of assets that are shown on this
22 balance sheet should fairly be considered as equity investments
23 and not as loans, and then he says that, under Irish law,
24 \$500 million of those assets are classified as loans because
25 that's permitted under Irish tax law. Again, with this as the

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1 only information that we have been supplied about the
2 guarantor, I see \$203 million of intercompany interest payable,
3 which seems completely out of whack with the idea that only
4 \$500 million of this is --

5 THE COURT: Look. At the risk of stating the obvious,
6 the maximum judgment you could get in front of Judge Stanton
7 is -- what -- \$44 million?

8 MR. FISHER: \$65 million.

9 THE COURT: Even treating that as the maximum
10 attainable, I mean, the numbers that we are talking about on
11 the certification vastly outstrip that. The problem is not
12 that one can't imagine some Oliver Stone-like scenario under
13 which all the money would vanish overnight, it is whether there
14 is a realistic prospect of that and Mr. Schwartz, among other
15 valid points, makes the commercial point that for his client
16 group, if you will, to do that, would carry considerable cost.
17 There comes a point for you at which the ideal can't be the
18 enemy of the very, very good.

19 MR. FISHER: Understood, your Honor. I think our
20 genuine concern is that looking at this balance sheet, it
21 appears that the assets really are in the nature of
22 intercompany equity contributions and obligations, and that
23 when we say it is under the control of Carlyle, the
24 Carlyle-controlled parent companies that made those equity
25 contributions could reclassify and completely change the

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1 financial picture of the guarantor entity and those
2 circumstances, even what the assets are, are completely opaque
3 to us without having been supplied with actual financial
4 statements that are audited and tell us what these assets are.
5 It is a piece of paper that says 1.7 --

6 THE COURT: When is your trial date, or do you have
7 one in front of Judge Stanton?

8 MR. FISHER: I don't think we have one.

9 THE COURT: You are through summary judgment so that's
10 the next step.

11 MR. FISHER: We are waiting for a trial date.

12 THE COURT: Mr. Schwartz, let me ask you this.
13 Supposing that a quarterly financial statement or certification
14 were to show a consequential change in a bad direction and
15 direction that suggested that, as feared by the plaintiffs,
16 money was leaving quickly enough to put them in some level of
17 concern, what would the remedy be? Imagine that the
18 certification process suggested along these lines, ideally
19 there would be a way in which this Court or somebody could step
20 in, tighten up some notice requirement, something like that.
21 What is the right solution to that? If you were at the front
22 table you might be making the same arguments but you would
23 probably find more persuasive the argument that there needs to
24 be some mechanism in the event that money begins to leave
25 quickly.

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1 MR. SCHWARTZ: Well, your Honor, your Honor has
2 jurisdiction of this case and you will have jurisdiction of
3 this case. If there is a concern that somehow money is leaving
4 the system, I suppose -- first of all, I would encourage them
5 to ask us.

6 THE COURT: No, no, no. You're right, I hear you.
7 Quarterly certification process is the means of getting
8 communication. Presumably you don't want to have some daily
9 conversation with them. The question is if that certification
10 shows a lot of money going out, is it that the plaintiff's
11 remedy would be to either reopen this case, if closed, or to
12 pursue some form of injunctive relief then targeted to that
13 problem? I am trying to figure out, there has to be a
14 mechanism here.

15 MR. SCHWARTZ: Let me talk about the part of the
16 guaranty that they didn't object to which is -- so, we
17 covenanted so a continuing obligation to maintain a minimum net
18 worth of \$65 million. They didn't object to that, they didn't
19 alter that. So that's really the bar here. And I understand
20 Mr. Fisher' view that their best case scenario is 65, that's
21 why it is pegged to that -- I think it is different -- but
22 that's the bar that below that then there is a problem for them
23 and they haven't challenged that. They have accepted we have
24 to have a minimum net worth of \$65 million.

25 THE COURT: I think Mr. Fisher' concern is suppose

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1 that that promise is broken.

2 MR. SCHWARTZ: Then it goes back to your Honor's first
3 point, if we are breaching the contract then there is a remedy
4 from that: They can come back to court. If we are still here
5 that's a pretty simple process. Or they would file a complaint
6 and seek for emergency relief based on the fact that we have
7 breached our contract. I am confused by their enforcement
8 mechanism. We have agreed to the floor and they haven't
9 objected to the floor. If they have a real concern that the
10 quarterly financial statements are showing something or going
11 in a direction that they don't like, they can have a
12 conversation with us.

13 THE COURT: What are the legal mechanisms available to
14 the plaintiff if they are concerned that the direction of
15 liquidity or creditworthiness, the direction of assets,
16 holdings, net worth is dropping precipitously; where do they
17 go?

18 MR. SCHWARTZ: Your Honor, I suppose they could argue
19 we were committing some kind of fraudulent transfer and ask the
20 Court for relief on that.

21 THE COURT: I mean, in other words, if they've got
22 more than, if Maverick has more than \$65 million, there is no
23 breach of the guaranty.

24 MR. SCHWARTZ: That's right.

25 THE COURT: On the other hand, if there are large red

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1 flags, the question is whether they could come to this Court
2 for relief. Is there some mechanism that can be built in like
3 that? You have, I hope, a not unreasonable audience, but if
4 there was some question like that, is there an audience they
5 could go to?

6 MR. SCHWARTZ: So, this is what I am struggling with,
7 because we would be in a situation where we are not in breach,
8 we are still completely in compliance with the guaranty and the
9 provision specifically negotiated and agreed to that there is a
10 minimum net worth. They would just be saying we don't like
11 where this is headed.

12 THE COURT: Right.

13 MR. SCHWARTZ: I don't know what the legal remedy is
14 for 'we don't like where this is headed' other than if they
15 think we are doing this to avoid their claim that they would
16 essentially have a claim for fraudulent transfer that they
17 could bring. I mean the point, that's we have a covenant that
18 we have to maintain that amount to give them comfort and that
19 is not something that they've pushed back on at all.

20 THE COURT: Mr. Fisher, any response?

21 MR. FISHER: Yes, your Honor, and this gets to the
22 Court's understandable skepticism about our criticism of the
23 lack of an enforcement remedy.

24 I understand that when someone enters into a
25 contractual guaranty and then they breached that guaranty, your

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1 recourse is to sue. I understand that. We can't go around
2 asking for guarantees of guaranties. So I think where our
3 concern centers is having an enforcement mechanism to ensure
4 that this guarantor entity, which is not currently before the
5 Court because it is not a defendant in the pending litigation,
6 actually maintains enough assets to pay the guaranty. But the
7 premise --

8 THE COURT: I'm sorry. This is a credible outfit that
9 is pledging to keep at least \$65 million on hand and has many
10 multiples of it. In effect you would be, if you will, adding
11 Maverick to the defendants in the Judge Stanton case as
12 sequential or reverse sequence of people to go to should you
13 prevail before Judge Stanton, and with the Judge Stanton case
14 pretty mature in timing, there is every reason to assume that
15 it is going to be litigated in the next 18 months, if not much
16 sooner. I mean, this isn't an endless time horizon. I am
17 hearing what you are saying but finding it very theoretical.

18 MR. FISHER: Your Honor, the concern that brought us
19 here in the first place, the filing of the Maverick lawsuit was
20 a circumstance where Carlyle moved assets out of what was
21 previously a judgment-worthy counterparty to a lease and so we
22 are looking for some assurance that the guaranty that we are
23 being offered is actually a guaranty where, at the end of the
24 day, when we go to collect in the event of a judgment there
25 will be assets there.

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1 THE COURT: Anything further from you?

2 MR. FISHER: Not on that point, your Honor.

3 THE COURT: Mr. Schwartz

4 MR. SCHWARTZ: Your Honor, I just wanted, I can't let
5 stand the statement that Carlyle moved assets to make something
6 judgment proof. There was a transaction between sophisticated
7 commercial parties. The statement has been made repeatedly
8 that AMCK, which is not Carlyle, is judgment proof. There has
9 been no evidence of that whatsoever presented to this Court or
10 to Judge Stanton.

11 THE COURT: Such that if the plaintiffs were to
12 prevail before Judge Stanton to the tune even of \$65 million,
13 so far as you understand right now, the defendants are still
14 good for it.

15 MR. SCHWARTZ: Yes. And not just that, we are putting
16 our money where our mouth is because we are effectively taking
17 the credit risk on that.

18 THE COURT: All right. Mr. Fisher, I think I have
19 heard enough on this one and, with respect, I am persuaded by
20 Mr. Schwartz. Your follow-up was well taken, it produced a
21 useful clarification by Mr. Meireles, but I think at this point
22 the defendants have reasonably identified a guarantor that has
23 the ability to pay, has committed to having the amount of money
24 available that would be enough to support paying out the
25 maximum judgment envisioned if AMCK was unable to pay it.

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1 Let me turn to a separate issue which is the proposed
2 form of the order that the Court would issue. Let me back up.
3 Before we get to that, plaintiff, I have reviewed your
4 objections. I have commented on them. Is there any other
5 objection that you have to the defendants' proposed guaranty?

6 MR. FISHER: Your Honor, we put before the Court a
7 form of guaranty that the parties had previously.

8 THE COURT: It doesn't matter, it is the defendants
9 who are making the offer. I appreciate that you can put before
10 what you want, but at the end of the day the issue isn't what I
11 might fashion or what you might fashion, it is whether the
12 defendants' guarantee is essentially sufficient to eliminate
13 the irreparable harm in question. And so, I walked through the
14 chain of events by which that happens, but at the end of the
15 day what I am evaluating is what the defendant has offered,
16 not the world as you would prefer it.

17 MR. FISHER: So in comparing what the defendants have
18 offered to the form of guarantee previously agreed to, I think
19 one point that is important and potentially could be worked
20 through is that their form of guarantee says that in the event
21 that there is a payment default or a failure to pay, then
22 they're relieved of the obligations under the guaranty. Under
23 the leases, in the event that there is a failure to pay, we
24 have a cure period and then it is not until there is an event
25 of default that action can be taken under the leases and we

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1 would simply ask that the guarantee that is proposed to us
2 track that same protection.

3 THE COURT: What is the problem if it doesn't?

4 MR. FISHER: Then there could be a technical problem
5 with the payment such that it arrives a day late and the
6 guarantors say that they're not relieved of any obligation
7 under the guaranty.

8 THE COURT: Mr. Schwartz?

9 MR. SCHWARTZ: Your Honor, a late payment is a late
10 payment but we specifically discussed this issue with with my
11 client and on this particular issue I think the concept that
12 Mr. Fisher is referring to is if there is an event of -- the
13 payment obligation under the guarantee would be suspended while
14 an event of default is continuing and that is the concept that
15 we would be able to agree to would -- and I would be --
16 obviously there is language, but getting rid of the termination
17 of the guaranty if there is a payment default and instead
18 putting in the condition on the payment that there be no
19 event --

20 THE COURT: In other words there is a tweak that you
21 are prepared to make some adaptation.

22 MR. SCHWARTZ: That's right, your Honor.

23 THE COURT: Thank you.

24 Mr. Fisher, you have gotten a bit of relief just
25 there. Anything else?

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1 MR. FISHER: No, your Honor.

2 THE COURT: Let me turn for a moment from the terms of
3 the guarantees, the proposed defense guarantee itself, to the
4 proposed form of order that the Court would issue. I have
5 compared and contrasted the proposed orders that the parties
6 have put before me that would issue, essentially, upon my
7 finding that there is a sufficient guarantee. The most
8 significant difference, by far, is it appears to be in
9 paragraphs 5 of the plaintiff's proposed order and I will let
10 everyone turn to these, is at Docket 119; Mr. Schwartz' letter
11 of August 8.

12 Paragraph 5 of the plaintiff's proposed Court order
13 would provide that within five business days of the closing of
14 the assignment transactions, the parties shall cause
15 stipulations of dismissal to be filed in this action and in the
16 action that was later removed to this Court, 23 Civ. 4774. So
17 the plaintiffs are proposing, essentially, that both lawsuits
18 go away in effect upon the, if you will, withdrawal of the
19 default notices of relief here.

20 Defendants, you don't propose that, I imagine you
21 would be quite happy to have the lawsuit that is the lower
22 docket number, 22 civil 2943 brought by the plaintiffs, go
23 away. Is there a reason why you are not asking that the later
24 action, which you have brought, go away?

25 MR. SCHWARTZ: Yes, because we have been damaged by

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1 the breach of contract. As it says, we have lost four sales
2 and have other damages. And I spoke to Mr. Fisher about this
3 particular paragraph prior to the orders being submitted and I
4 said that we are not willing to dismiss the higher-docketed
5 number case. I don't think we would have an objection to
6 dismissal of the lower-docketed numbered case.

7 THE COURT: Let me ask you, Mr. Fisher, there is
8 clearly no reason why this provision has to be in such an order
9 and there is no reason to reach any farther into issues we
10 don't need to reach. Taking the litigations one by one,
11 providing that a guarantee were entered into and the default
12 notices withdrawn, would you nonetheless be dropping this
13 lawsuit, 22 civil 2943?

14 MR. FISHER: No, your Honor. Paragraphs 5 and 6 of
15 our proposed order were proposed in the spirit, before I had a
16 chance to talk it through more completely with Mr. Schwartz,
17 that perhaps the closing of these controversial sale and
18 financing transactions would lead to circumstances where both
19 sides would be willing to just walk away from all of the
20 litigation. Obviously, you need two hands clapping to do that,
21 and unfortunately I think we have to have more modest
22 aspirations in terms of what is achievable right now.

23 THE COURT: If the default notices went away -- and
24 again, there is absolutely no reason to reach this issue now,
25 at this point the sole goal is to find a way to dissolve the PI

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1 in a way that protects against the irreparable harm, but out of
2 curiosity, if the default notices went away, what would your
3 theory of damages be in this litigation?

4 MR. FISHER: In lawsuit no. 2 we have incurred all
5 kinds of expenses and costs in connection with the sale
6 financing transaction and that would be the measure of damages
7 and losses, your Honor.

8 THE COURT: We clearly don't need to go there now. In
9 the event that we can clear this, perhaps it will put the
10 parties in a position where they can separately discuss a way
11 of resolving the two pending cases but, in any event, it is
12 clearly not business we need to take on here.

13 There is a more subtle difference between the orders
14 which is that the plaintiff's says that I will order the
15 defendants to rescind the default notice; the defendants' say
16 that they will withdraw them. It is not obvious there is any
17 difference insofar as I would be issuing a Court order. I
18 think either way it effectively follows.

19 Mr. Schwartz, do you see any difference between those
20 nuances?

21 MR. SCHWARTZ: Yes, your Honor. Let me just explain
22 the way we have structured it.

23 THE COURT: Yes.

24 MR. SCHWARTZ: The way we have structured it is we
25 give the guarantee. That is the basis for which the injunction

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1 is dissolved. There then needs to be -- Frontier needs to then
2 sign the documents. I don't think that they're in a position
3 to do that immediately so there needs to be some time by which
4 they are required to have to sign the documents.

5 THE COURT: You give them two weeks in your order.

6 MR. SCHWARTZ: That's right.

7 THE COURT: That doesn't seem unreasonable. Why is it
8 that that is such a process?

9 MR. SCHWARTZ: We provided the documents to Frontier.
10 I understand they haven't commented on all of them and there is
11 a number of -- I think it is dozens of documents.

12 THE COURT: These are not standard form documents?

13 MR. SCHWARTZ: They are, but we still haven't received
14 comments back. It is industry standard, but it is not like the
15 old Bloomberg form where you print it out and they sign it. My
16 client believes that this could be done in 24 to 48 hours, I
17 got a little heat for suggesting two weeks because I thought
18 that was a reasonable amount of time, but we wanted to build in
19 time where they have time to sign the documents and provide
20 them to us. But if we just rescind the default notices now, we
21 are back to square one if they don't actually do that and so
22 that's why we wanted to have that outstanding.

23 THE COURT: Walk through the sequence of events as you
24 plan it out.

25 MR. SCHWARTZ: As I plan it out, the guarantee gets

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1 provided tomorrow. By two weeks from tomorrow, all the
2 documents that we need to have signed in order to do the
3 transactions, will have been provided to us by Frontier.

4 THE COURT: And executed.

5 MR. SCHWARTZ: Yes, correct; when I say provided I
6 mean executed copies are provided that is two weeks or one
7 week. Whenever we get the final document, we then rescind the
8 notice of default.

9 THE COURT: And in the intervening period no action
10 would be taken on the notice of default?

11 MR. SCHWARTZ: Correct. Correct. We are not trying
12 to enforce, we are really hoping that this is the end of it;
13 right?

14 THE COURT: You and me both.

15 Mr. Fisher, any problem with that sequence?

16 MR. FISHER: Yes, your Honor. I think this is really
17 important, the question sequencing I think is really important
18 to ensure that things potentially go as smoothly as they can
19 from here.

20 First of all, I think the fallacy in Mr. Schwartz'
21 argument is that the guarantee resolves the need for injunctive
22 relief. What resolves the need for injunctive relief is the
23 withdrawal of the default notices, because until those are
24 withdrawn, we remain under threat of having the aircraft
25 impounded.

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1 THE COURT: Mr. Schwartz, didn't speak to one way or
2 the other to when the injunction lifts. I assume,
3 Mr. Schwartz, the injunction, since it has been keyed to the
4 default notices, lifts when the default notices are withdrawn.

5 MR. SCHWARTZ: Your Honor, the purpose of the
6 injunction falls away -- let me take a step back.

7 The basis on which the Court entered the injunction,
8 among others, was that there was a reasonable question going to
9 the merits as to whether, for lack of a better term, Frontier
10 was exposed on the first case. The guarantee resolves that
11 issue so there is no -- to the extent there ever was one, there
12 is no plausible basis for Frontier to continue to withhold its
13 cooperation. So my view is, by providing the guarantee, there
14 is no longer any justification for the injunction. The reason
15 we want to have the default notices throughout is because,
16 otherwise, we are just back to where we are.

17 THE COURT: Well, if you are agreeing to not act on
18 the default notices for the two-week period, I take it it is in
19 effect as if they are shelved, although they're not literally
20 withdrawn they are voided of any power in functional practice.

21 MR. SCHWARTZ: Yes. Exactly. The question is in two
22 weeks -- and I am really not trying to cause problems here but
23 in three weeks, if we haven't gotten the documents, we are
24 still under an injunction, we then have to come back to the
25 Court again and ask the Court to lift the injunction because we

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1 haven't been provided the documents.

2 THE COURT: But the injunction really involves
3 grounding, impounding, and de-registering the aircraft.

4 MR. SCHWARTZ: That's correct.

5 THE COURT: May I ask you, what is the problem with
6 that injunction remaining in place until the defendants'
7 notices have been retracted? In other words, that's all the
8 injunction does, it doesn't do a bunch of other things. Since
9 you are not going to be doing that, what is the harm in keeping
10 the injunction, as thus formulated, in place?

11 MR. SCHWARTZ: We need to have a deadline by which
12 Frontier provides us with the executed documents.

13 THE COURT: Right.

14 MR. SCHWARTZ: And if that deadline is part of the
15 order, then I think it gets us to the same place.

16 THE COURT: Right. So that seems to me to be the
17 answer, right? In other words, from my perspective, I treat
18 the irreparable harm here as flowing from the default notices
19 and I have rather narrowly drawn the injunction. It seems to
20 me that you have an interest in getting this process done
21 quickly so build in a deadline in the proposed order. Why
22 doesn't that solve all of your problems?

23 MR. SCHWARTZ: I think it does. As long as they're
24 under Court order to do it I think that's -- I don't think
25 either of us had envisioned necessarily to get a Court order to

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1 provide it but if that is what is going to happen, that solves
2 the problem. We just want to make sure there is some deadline
3 out there.

4 THE COURT: Got that.

5 MR. SCHWARTZ: Our mechanism is still have the notice
6 of default outstanding if the mechanism of the deadline -- if
7 the Court imposes the deadline I think that's fine.

8 THE COURT: Sorry. If I am imposing a deadline, are
9 the notices of default still outstanding and the injunction
10 therefore still in place? My view is the injunction should be
11 dissolved once the notices of default go away.

12 MR. SCHWARTZ: I think we can do that simultaneously,
13 that as soon as the documents are provided then the injunction
14 goes away and the notices of default are rescinded.

15 THE COURT: Mr. Fisher, this feels like something that
16 thoughtful counsel can sort out without my wordsmithing.

17 MR. FISHER: Yes, but with one remaining concern.

18 First of all, if what is being said now is that
19 Mr. Schwartz will agree that the injunction remains in place
20 until the default notices are withdrawn, I agree, that
21 alleviates the concern of some risk of irreparable harm while
22 we negotiate over these transactions, the sale financing
23 transactions proceeding. To be very clear, in the event that
24 we receive a proposed guarantee that satisfies our concerns
25 about the collectability of a judgment in lawsuit 1, in

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1 connection with the sale financing transactions going forward,
2 we will not raise any objection to those transactions going
3 forward in any way related to any of the transactions that are
4 the subject of this lawsuit or lawsuit 1 --

5 THE COURT: Let me pin that down. Have you had a
6 chance to review the transaction documents whose non-execution
7 is what prompted the issuance of the default notices?

8 MR. FISHER: Your Honor, this is my concern. I am not
9 an aircraft leasing transactional lawyer. My understanding is
10 that we are talking about upwards of more than 165 different
11 documents that, even everyone working together cooperatively
12 with goodwill to get the transaction done, my understanding is
13 that two weeks is not a realistic deadline, it is actually
14 somewhat arbitrary and my concern is if that two weeks deadline
15 turns out to be three weeks, we end up with fights about not
16 reasonably cooperating with the transaction.

17 THE COURT: I have to tell you, two weeks sounds like
18 a lot of time. Honestly, this is New York law. A colleague of
19 mine would say put on your big boy pants. I mean, really.

20 MR. FISHER: Understood, your Honor. I am not -- I
21 have been talking to the lawyers that need to do it and my
22 understanding is two weeks is extremely rushed and not
23 realistic. And we also have an interest in the -- once we get
24 the elephant in the room out of the courtroom, which is our
25 concern about the collective of lawsuit 1, we also have an

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1 interest in the sale financing transactions going forward
2 because it means less to do with Carlyle. We are happy to have
3 it happen.

4 THE COURT: I know you that but I mean, look, this has
5 been out there for a while. Mr. Schwartz, does the front table
6 have the copy of the documents that need to be executed?

7 MR. SCHWARTZ: Yes, your Honor, and I think they have
8 had it for weeks; July 18th.

9 THE COURT: Mr. Fisher, is that true or not?

10 MR. FISHER: Yes. I believe that we have had many of
11 the documents. I also understand that there are documents that
12 are necessary in order to close on these transactions that
13 involve -- that still need to be negotiated with third-parties.
14 We are not responsible for doing that, Carlyle is, I don't know
15 what the timeline is for those kinds of issues and I just don't
16 want to end up missing a deadline that sets this up for failure
17 and further controversy.

18 THE COURT: Has your client reviewed the documents
19 that it has had since July 18th?

20 MR. FISHER: Yes. I believe so, your Honor.

21 THE COURT: Do they have any problems?

22 MR. FISHER: I think there are some comments that they
23 would send back to work through.

24 THE COURT: I'm not buying it. Sorry. It seems to me
25 this has been out there for a long time. If the notion was

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1 going to be that the process of reviewing these documents was
2 so complicated that it was going to need more time, there was
3 every opportunity for you to have brought that to my attention
4 beforehand. This does not sound like decoding the Rosetta
5 Stone. It just does not. I'm sorry.

6 Is there anything else you want to raise with me,
7 Mr. Fisher ?

8 MR. FISHER: No, your Honor. I'm just -- once a
9 guarantee is issued, and I do need to reserve our rights to see
10 the guarantee and continue to press objections, but if the
11 guarantee satisfies all of our concerns then we will consent to
12 the transactions and we will work diligently, in good faith
13 cooperatively, to just get this done so long as we are not
14 facing the risk of impoundment.

15 THE COURT: To be clear about the guarantee, I
16 appreciate that there is a detail or two brought out here that
17 need to be worked through. We don't have a guarantee yet in
18 final form, although on the substance of things I am, as you
19 can tell, with the defense as to the objections that you have
20 raised, I have reviewed them earlier, but I am broadly
21 comfortable with the guarantee as designed by the defendant.
22 And so it seems to me, once you have a final form guarantee, if
23 there are portions of it that you object to you are welcome to
24 bring it to my attention. But, if at the end of the day I find
25 the guarantee to be satisfactory, it is your decision whether

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1 or not to sign it but your not signing it isn't what preserves,
2 won't be a reason to preserve the preliminary injunction. My
3 view is if this is satisfactory guarantee I have signed off on,
4 you can take it or leave it but it would, to my mind, the
5 existence of such a guarantee would mean that any harm here is,
6 from my perspective reparable, not irreparable, it would be at
7 your hand to repair it by executing the guarantee. The client
8 can make the business decision not to do that, but at the end
9 of the day, if I find the guarantee is satisfactory on the
10 standards that we have been talking about, that's what gets rid
11 of irreparable harm here.

12 MR. FISHER: I understand that, your Honor. That's
13 fully understood and I think that as a result of this
14 conference there have been certain accommodations made that
15 will hopefully resolve in a proposed guarantee that does
16 satisfy many of our concerns and we will decide to simply
17 accept it. My concern after that is -- and again, here I'm
18 talking about an area of law where I am not a transactional
19 lawyer, I'm not an expert -- but my understanding is that even
20 when straightforward, these are fairly complicated transactions
21 and I just want to ensure that the parties have enough space to
22 get it done without having to run back to court.

23 THE COURT: Look. There has been space already but
24 here is my suggestion. There are -- here is how I propose we
25 would proceed. Mr. Schwartz, are there any ambiguities that I

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1 have left here as to my rulings with respect to the guarantee?
2 I think I have tried to be clear but if there is something I
3 have left unclear, I am happy to address it.

4 MR. SCHWARTZ: No, your Honor. I think you have been
5 clear. The one thing that I would clarify is the form of
6 guarantee that we submitted wasn't actually bilateral, we were
7 just going to provide it. So part of our concern is having to
8 have them countersign it. Our proposal was just to provide the
9 guarantee and if the Court finds it acceptable, that's a
10 guarantee.

11 THE COURT: Right, but look, if there was a detail
12 that still needs --

13 MR. SCHWARTZ: We will provide it to them to review
14 first. If they provide a reasonable comment then we are more
15 than happy to work with them but what we can't do is get into a
16 back and forth over the next few weeks about this or that.

17 THE COURT: Here is my suggestion. If we said that by
18 the end of Tuesday -- which gives you, Mr. Fisher, another five
19 days for your clients to get out of the gate dealing with the
20 transaction documents -- I was to be provided by the form of
21 guarantee that the defendants are proposing -- and I expect it
22 will be consistent with this discussion today -- it will pick
23 up the detail that I know still had to be included and I hope
24 you will be solicitous of suggestions from the front table
25 because, ideally, this is something that maximally achieves

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1 everybody's interest. Provide to to me then, with a letter
2 that identifies, Mr. Fisher, if you have any additional
3 objections -- I'm not asking you to propose ones that have
4 already been covered -- I will promptly let you know whether or
5 not the guarantee is satisfactory. If it is, then I would
6 expect to issue an order consistent, broadly, with the defense
7 form of order that would eventually cause the dissolution of
8 the preliminary injunction. The important caveat there,
9 Mr. Schwartz, is the sequencing that we talked about, and I
10 would like the preliminary injunction to dissolve upon the
11 retraction of the default notices.

12 What that does is it, among other things, gives the
13 front table another five days on top of the two weeks in which
14 to review these documents. Your client would, therefore, be
15 well-advised to put pen to paper this afternoon.

16 MR. SCHWARTZ: I think your Honor's guidance is clear.
17 The only question I have is would you like for us to submit a
18 proposed form of order along with the letter on Tuesday?

19 THE COURT: Yes. Again, look, Mr. Fisher, I'm not
20 inviting you to go over ground that's already been covered but
21 I appreciate that we have covered some new subjects today and
22 there may be comments your client has, but at the end of the
23 day, broadly, I am envisioning an order that is broadly
24 structured as the defense has proposed it but with
25 modifications covered today.

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1 MR. SCHWARTZ: Yes.

2 THE COURT: So, yes, I would welcome essentially the
3 proposed guarantee, the proposed order, and let us say a joint
4 letter that sets out any outstanding issues with respect to
5 each and I will promptly review them, either rule by virtue of
6 an order or get everybody on the phone with a court reporter,
7 to take care of such loose ends that remain.

8 MR. SCHWARTZ: Thank you, your Honor.

9 THE COURT: Listen, before we go, because I am really
10 trying to be a force for closure and good here -- take a moment
11 I think -- Mr. Schwartz, take a moment.

12 (Counsel conferring)

13 THE COURT: Mr. Schwartz?

14 MR. SCHWARTZ: Thank you for the moment, your Honor.
15 That sounds fine with us.

16 THE COURT: Mr. Fisher?

17 MR. FISHER: Nothing further from us, your Honor.

18 THE COURT: Any other guidance I can usefully give? I
19 want you all collectively to get over the goal line. Is there
20 anything I can do or say that will assist you, or that would be
21 useful for a client to hear?

22 MR. SCHWARTZ: I don't think so, your Honor. Thank
23 you for your attention.

24 THE COURT: Mr. Fisher, same?

25 MR. FISHER: No, your Honor. Nothing.

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1 THE COURT: Be well, have a good rest of summer. I
2 expect this will be the last time I see you on the injunctive
3 part of the case. I am very much hopeful that this conference
4 will get us across the goal line.

5 Let me pause before I adjourn. I look forward to
6 receiving what submit on Tuesday and I will act on it very
7 promptly. I do want to thank counsel. This is a complicated
8 problem and I appreciate very much the caliber of the advocacy.
9 No judge likes to get a motion for reconsideration but I
10 appreciated what the defense was trying to do and educate me
11 more about the issue at hand. I thought it was a well done
12 document. I will be eager to see the plaintiff's response
13 unless counsel are able to reach -- I think it is the 16th that
14 the submission is due. I will let you all discuss it but
15 depending on, assuming that we have a guarantee that you have
16 essentially agreed on, you may agree that it is worth
17 suspending further briefing on that. But the bottom line is I
18 have been the beneficiary of very thoughtful, careful,
19 lawyering from both sides and it has assisted me a great deal.
20 So, I thank you. Please thank the members of your teams who
21 are not present here today for the hard work during the summer.
22 I look forward to seeing you down the road in this case.

23 I will ask you though, counsel, once we have put the
24 injunctive phase behind us, please speak with one another to
25 see whether there is a way that the two litigations that are

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1 before me can be resolved. With this drama behind us there may
2 be grounds on which to conclude that further litigation on this
3 just isn't economically worthwhile but you will make that
4 judgment.

5 Thanks. We stand adjourned.

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